

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

77-4118

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Long Island Rail Road Company,
Petitioner,

v.

The United States of America and The Interstate
Commerce Commission,
Respondents,

S & K Farms, Inc. and Freight Users Association
of Long Island, Inc.,
Intervening Petitioners,

Southern Pacific Transportation Company,
The Atchison, Topeka and Santa Fe Railway Company,
Missouri Pacific Railroad Company,
St. Louis Southwestern Railway Company,
and Union Pacific Railroad Company,
Intervening Respondents.

Petition for Judicial Review of an Order of
the Interstate Commerce Commission

BRIEF OF INTERVENING PETITIONERS

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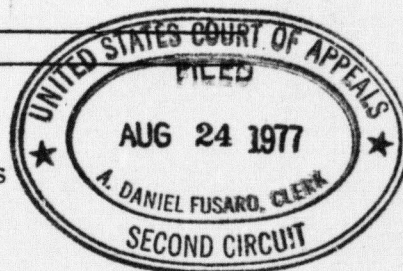


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PRELIMINARY STATEMENT

Intervenors, S & K Farms, Inc. (hereinafter "S & K")
and Freight Users Association of Long Island, Inc. (herein-
after "FUA"), hereby adopt the Brief of Petitioner, filed on
behalf of the Petitioner, The Long Island Rail Road Company
(hereinafter "LIRR"), in the above captioned matter on
August 8, 1977, except as hereinafter supplemented.

SUMMARY OF ARGUMENT

The concern of S & K and the members of FUA is that freight rates to and from points on the LIRR should be the same as to other points in the New York metropolitan area. This is a simple commercial necessity if we are to be able to compete with businesses in this area which are served by other rail carriers, such as ConRail or Brooklyn Eastern District Terminal Railway.

The failure of the ICC's Division 2 to prescribe and establish transportation charges to and from points on the LIRR which are equal to charges paid in the New York City rate group results in an unreasonable practice in violation of Section 1(6) and in undue preference and prejudice in violation of Section 3(1) of the Interstate Commerce Act.

Accordingly, shippers and receivers of the subject freight on the lines of the LIRR have been and continue to be damaged by the ICC's decision and order, and request this Court to reverse and remand the matter to the Commission for reconsideration.

ARGUMENT

Point I

The failure of the ICC to prescribe joint rates for fresh fruits and vegetables from the southwest to points on the LIRR is arbitrary, capricious and in violation of the ICA.

During the course of the ICC proceedings below, the Commission, after extensive hearings, approved a comprehensive revision to freight rates for fresh fruits and vegetables from southwestern origins. The new rates were acceptable to all participating carriers except the LIRR, due to the fact that the LIRR applies a 12-1/2% surcharge to all shipments originating or terminating on its line. If the LIRR were to concur in the new rates, its freight charges to Long Island receivers would be 12-1/2% higher than the charges to other receivers in the New York rate group. Accordingly, the LIRR asked the Commission to prescribe "special" base rates lower than the Group A rates for its traffic, so that, when the 12-1/2% surcharge was added to the base rate, the total rate paid by Long Island receivers would be the same as paid by others in the New York area.

The Administrative Law Judge, in his initial decision, agreed with the LIRR's position, stating:

"Consistent with the above conclusions, the Judge finds that the rates under investigation are just and reasonable, but that they constitute an unreasonable practice in violation of section 1(6) and have been shown to be unduly prejudicial and preferential

in violation of section 3(1) of the Act to the extent that (1) the said rates and related or alternative rates to points on the LIRR, when combined with LIRR's surcharge, do not make the total transportation charges paid by LIRR receivers the same as those paid by the other receivers in the New York City rate group...."

Joint Appendix, p. 54a

Division 2, however, reversed the Administrative Law Judge on this finding on the grounds that there was insufficient evidence in the record and that it was a "divisions" matter which should be the subject of another proceeding. Joint Appendix, p. 109a.

This was error. It is patently obvious that a rate to points on Long Island which is 12-1/2% higher than to points in the surrounding metropolitan area is prejudicial to Long Island receivers. It is also patently obvious that, in the face of prior decisions upholding the LIRR's surcharge, it is an unreasonable practice for the other carriers to refuse to establish proper rates with the LIRR.

Furthermore, when FUA did try to intervene and make its case before the Commission on behalf of Long Island receivers, the Commission summarily denied its request. Joint Appendix, p. 125a.

In addition to the facts and reasons set forth in our Petition for Leave to Intervene, filed herein with the Court on June 27, 1977 and granted by order dated July 1, 1977, the

Court is asked to take judicial notice of a complaint filed on June 24, 1977 with the ICC in Docket No. 36651, S & K Farms, Inc. and Freight Users Association of Long Island, Inc. v. Long Island Rail Road Company, et al, a copy of which is annexed hereto as Appendix A. This complaint illustrates the substantial economic injury which is currently being suffered by S & K as a result of the Commission's refusal to prescribe joint rates for Long Island receivers.

There is no question but that the ICC has the authority and the responsibility to protect the interests of the shipping public. The issues raised in the proceedings below are clearly sufficient to require the Commission to determine and prescribe the rates requested by the LIRR. See Sections 15(1), (3) of the Act, 49 U.S.C. Section 15(1), (3). The decision and order of Division 2, with respect to the issues before this Court, was erroneous, arbitrary and capricious, and a violation of the Commission's obligations to the shipping public.

CONCLUSION

For the reasons set forth above, the Court should find that the decision and order of Division 2 of the ICC was arbitrary, capricious and contrary to law. The order should be reversed and remanded to the Commission with direction to prescribe a rate level for points on the LIRR which, when subjected to the LIRR's 12-1/2% surcharge, will be equal to other points in the New York City rate group.

Respectfully submitted,

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Attorneys for
Intervening Petitioners.

August 18, 1977

A1

BEFORE THE
INTERSTATE COMMERCE COMMISSION

I.C.C. DOCKET NO. 36651

S & K FARMS, INC., and
FREIGHT USERS ASSOCIATION OF LONG ISLAND, INC.

--versus--

LONG ISLAND RAIL ROAD COMPANY, et al

FORMAL COMPLAINT

George Carl Pezold
Attorney for Complainants

Of Counsel

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(516) 427-0100

Dated: June 24, 1977

BEFORE THE
INTERSTATE COMMERCE COMMISSION

-----X
S & K FARMS, INC., and FREIGHT USERS
ASSOCIATION OF LONG ISLAND, INC.,

Complainants

-versus-

Docket No. 36651

LONG ISLAND RAIL ROAD COMPANY, et al,
Defendants.

-----X

The complaint of the above-named complainants
respectfully shows:

THE COMPLAINANTS

1. Complainant, S & K FARMS, INC. (S & K), is a domestic corporation having its principal place of business at 70-10 74th Street, Middle Village, New York.

2. S & K supplies fresh fruit, and vegetables, as well as processed and prepared foods, principally to Chinese restaurants and institutional customers in New York City, Long Island, Westchester and points in New Jersey and Connecticut. It supplies 30-40% of the Chinese food market in this area for fresh onions, celery, lettuce, artichokes, etc., as well as prepared (peeled, chopped, etc.) vegetables, egg roll mix and similar products.

3. S & K receives approximately three (3) carloads per week of fresh produce from California origins and, in season, approximately two (2) carloads per week from Idaho origins. Vegetables from New York, Maine, North Carolina and other eastern origins are generally received by truck. The company has a receiving facility and plant with a rail siding served by the LONG ISLAND RAIL ROAD. It employs over 40 employees, most of whom are minorities, and operates eleven (11) 16-ft. vans with which it delivers merchandise daily to customers.

4. Complainant, FREIGHT USERS ASSOCIATION OF LONG ISLAND, INC. (FUA), is a not-for-profit corporation organized under the laws of the State of New York, with principal offices in the Town of Huntington, Suffolk County, State of New York. Membership of FUA is comprised of approximately forty shippers and consignees of rail freight on Long Island. The Association has acted as the principal spokesman and representative of Long Island's freight users vis-a-vis the LONG ISLAND RAIL ROAD since 1970 with respect to rail freight service, rates, tariffs and related matters.

THE DEFENDANTS

5. This complaint is filed against the LONG ISLAND RAIL ROAD COMPANY and all of its connecting carriers involved in the shipments complained of herein, included but not limited to SOUTHERN PACIFIC TRANSPORTATION COMPANY, ROCK ISLAND RAILROAD,

CONSOLIDATED RAIL CORPORATION (CONRAIL) and BROOKLYN EASTERN DISTRICT TERMINAL RAIL ROAD, all of which are common carriers by railroad, engaged in the transportation of property between points in various States of the United States. Said defendants are subject to the provisions of the Interstate Commerce Act.

BACKGROUND

6. The violations which are the subject of this complaint relate to carload shipments of fresh fruits and vegetables originating at various points in the west and southwest mostly on the lines of the SOUTHERN PACIFIC, and terminating at complaint, S & K's, plant at Middle Village, Long Island, New York, on the lines of the LIRR.

7. Prior to April 30, 1977, said shipments moved under the old carload joint rates set forth in Item 5210, Tariff TCFB 44R (ICC No. 1838), and were subject to the LIRR terminal surcharge of 12-1/2%. On April 30, 1977, the joint rates expired in accordance with Ref. E of Item 5210, Tariff TCFB 44R.

8. Since April 30, 1977, no joint commodity rates have been in effect between the points referred to above, and all such shipments of fresh fruits and vegetables have moved under combination rates. Upon information and belief, the lowest combination rate available to complainant for the subject shipments is via Hooker, Oklahoma, utilizing provisions of Item 5305, Tariff TCFB 44R, and Item 20400, Part 1, Tariff SWFB S/W 2005 (ICC No. 5049), plus the LIRR terminal surcharge of 12-1/2%.

9. Complainant's competitors in the immediate New York metropolitan area (e.g., Hunts Point, Bronx, etc.) are served by ConRail as the destination carrier. Service is also available on the Brooklyn Eastern District Terminal Railroad (BEDT) in Brooklyn via float connection with ConRail from Greenville, New Jersey. These competitors may avail themselves of the recently published incentive rates for fresh fruits and vegetables to Group A destinations, e.g., Item 5305, Tariff TCFB 44R. These rates are joint, through rates to the Group A points and, naturally, do not bear a LIRR terminal surcharge.

10. The following is a comparison of the combination rate paid by complainant on the LIRR with Group A rates paid by its competitors on ConRail or BEDT lines in the nearby New York metropolitan areas. The example used is a typical shipment of celery, 50-ft. car, from Oxnard, California to the respective destination.

	<u>LIRR (Middle Village)</u>	<u>ConRail or BEDT (Group A)</u>
Joint rate (Item 5305 Tariff TCFB 44R)	-----	\$3573.00
Combination rate		
a) Oxnard, CA to Hooker, OK (Item 5305 Tariff TCFB 44R)	\$1701.00	-----
b) Hooker, OK to Middle Village (Item 20400, Part 1, Tariff SW/E 2005)	\$2029.15	-----
LIRR 12-1/2% Surcharge	<u>\$ 466.27</u>	<u>-----</u>
TOTAL	\$4196.42	\$3573.00

11. To quantify the problem, S & K receives approximately 175 carloads of fresh fruits and vegetables from west coast origins per year. Thus, S & K will be paying \$109,000 more per year than a competitor located only a few miles away on ConRail or BEDT sidings!

12. S & K maintains private sidings at its plant in Middle Village, New York and is served only by the LIRR. The nearest public team track on BEDT is about five miles away and on ConRail about five miles away from S & K's plant. Even though this distance is minimal, it costs about \$700.00 per car to unload and truck from one of these sidings due to the high cost of dreyage and labor in the New York metropolitan area.

13. Competition in the restaurant and institutional food market in the New York area is very keen. Vendors generally solicit on a daily basis and business is very sensitive to price competition. Since a major cost element in fresh fruits and vegetables is the freight cost, a rate which is substantially higher to one receiver than another in the same competitive market actually means the difference between a profit and going out of business.

VIOLATIONS OF SECTIONS 1(6) AND 3(1) OF THE ICA

14. The failure of the defendant carriers to establish a rate level which, when combined with the LIRR's terminal surcharge of 12-1/2% results in a level of rates and charges to points on LIRR equal to the rates and charges applied by other railroads serving the New York, NY rate group area, is an unjust and unreasonable practice in violation of Section 1(6) of the Interstate Commerce Act. It results in unequal transportation charges which are unduly prejudicial to complainant, S & K, and unduly prejudicial to its competitors located in the same area.

WHEREFORE, complainant respectfully requests that the Commission:

A) find that the practices complained of herein are unreasonable and violate Section 1(6) of the Act and result in unequal and unduly preferential and prejudicial charges in violation of Section 3(1) of the Act;

B) order the defendant carriers to cease and desist from such violations;

C) determine and prescribe just and reasonable joint, through rates and charges for points on the LIRR;

D) award reparations to complainant for its damages; and

E) grant such other relief as may be just and appropriate under the circumstances.

DATED: Huntington, New York
June 21, 1977

Respectfully submitted,

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Attorney for Complainants

Of Counsel
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P. O. Box Z
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(516) 427-0100

The action requested herein will have no effect on the quality of the human environment.

Long Island Rail Road Company

Southern Pacific Transportation Company

Chicago, Rock Island and Pacific Railroad Company

Consolidated Rail Corporation

Brooklyn Eastern District Terminal Railroad

VERIFICATION

STATE OF NEW YORK }
COUNTY OF QUEENS } ss.:

ALVIN SCHEPPS, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

ALVIN SCHEPPS

Sworn to before me this
day of June, 1977.

Notary Public

Interstate Commerce Act

DETERMINATION OF RATES, ROUTES, ETC.; ROUTING OF TRAFFIC; DISCLOSURES, ETC.

24 Stat. 384.
34 Stat. 530.
36 Stat. 531.
41 Stat. 484-8.
44 Stat. 1447.
48 Stat. 1102.
49 Stat. 513.
54 Stat. 911.

Determination
of rates, classi-
fications, regu-
lations or prac-
tices, by
Commission.

48 Stat. 1102.

Commission
may fix maxi-
mum, minimum
or precise
rates.

54 Stat. 911.

Carriers to
cease and desist
from viola-
tions found.

Orders effective
as prescribed,
and to be
obeyed.

SEC. 15. [As amended June 29, 1906, June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, August 9, 1935, September 18, 1940.] [49 U. S. C. § 15.] (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

NOTE.—Comparable provisions, part II, §§ 216 (e) and 218 (b); part III, §§ 307 (b), (h), and 315 (b); part IV, § 406 (b).

General authority to issue orders, part II, § 204 (a) (6); part III, § 304 (a); part IV, § 403 (a).

Time when or-
ders take effect.

Continuance in
effect of order.

(2) Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

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Sec. 15

NOTE.—Comparable provisions, under part II, § 221 (b); part III, § 315 (d); part IV, § 416 (c).

(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

54 Stat. 911.

Through routes and joint rates, etc., with rail and with water carriers.

Divisions, operating terms and conditions.

Street electric passenger railways excepted.

Burden of proof, when cancellation suspended.

NOTE.—Comparable provisions, part II, § 216 (e); part III, § 307 (d).

(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as com-

54 Stat. 911.

Limitation on power to prescribe through routes.

Sec. 15

Establishment
of temporary
through routes
in emergency.

pared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

NOTE.—As to nonapplicability of provisions of § 15 (4) in investigation and suspension of cancellations of joint rates, etc., under part III, see § 307 (d).

41 Stat. 486.

Unloading and
reloading ordi-
nary livestock
at public
stockyards.

When extra
charge may be
made.

Commission to
prescribe or
approve rules.

(5) Transportation wholly by railroad of ordinary livestock in car-load lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing

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Sec. 15

service as to shipments other than those to or from public stockyards.

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

41 Stat. 486.

Commission
may prescribe
divisions of
joint rates.

Divisions made
retroactive.

Considerations
in determining
divisions.

NOTE.—Comparable provisions, part II, § 216 (f); part III, § 307 (e).

(7) Whenever there shall be filed with the Commis- 44 Stat. 1447.

Sec. 15

Investigation
of new rate,
classification,
regulation, or
practice.

Suspension
pending
decision.

Period of
suspension.

Order as to
such rate, etc.

Expiration of
suspension
period prior
to decision.

New rate, etc.,
becomes effective.

Accounting
required for
increased
amounts re-
ceived.

Refund of in-
creased
amounts re-
quired if
change not
justified.

54 Stat. 912.

sion any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the

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Sec. 15

date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Burden of proof as to reasonableness of changed rates.

Preference given suspension cases.

NOTE.—Comparable provisions as to investigation and suspension: part II, common carriers, § 216 (g); contract carriers, § 218 (c); part III, common carriers, § 307 (g); contract carriers, § 307 (1); part IV, freight forwarders, § 406 (e).

(8) In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this part to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this part provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

36 Stat. 553.

Shippers may designate routing.

Exceptions and regulations.

Carrier's duty to route, bill, and transport as directed.

Choice between competing lines.

(9) Whenever property is diverted or delivered by one carrier to another carrier contrary to routing instructions in the bill of lading, unless such diversion or

41 Stat. 487.

Sec. 15

Accounting,
as between
carriers; for
proceeds of
diverted trans-
portation.

delivery is in compliance with a lawful order, rule, or regulation of the Commission, such carriers shall, in a suit or action in any court of competent jurisdiction, be jointly and severally liable to the carrier thus deprived of its right to participate in the haul of the property, for the total amount of the rate or charge it would have received had it participated in the haul of the property. The carrier to which the property is thus diverted shall not be liable in such suit or action if it can show, the burden of proof being upon it, that before carrying the property it had no notice, by bill of lading, waybill or otherwise, of the routing instructions. In any judgment which may be rendered the plaintiff shall be allowed to recover against the defendant a reasonable attorney's fee to be taxed in the case.

Commission
may direct
routing when
shipper does
not.

(10) With respect to traffic not routed by the shipper, the Commission may, whenever the public interest and a fair distribution of the traffic require, direct the route which such traffic shall take after it arrives at the terminus of one carrier or at a junction point with another carrier, and is to be there delivered to another carrier.

Unauthorized
disclosure of
information as
to shipments
unlawful.

26 Stat. 553.

(11) It shall be unlawful for any common carrier subject to the provisions of this part, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: *Provided*, That nothing in this part shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any State or Federal court, or to any officer or agent of the Government of the United

When dis-
closure lawful.

PART I, INTERSTATE COMMERCE ACT

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Secs. 15-15a

States, or of any State or Territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

NOTE.—Comparable provisions, part II, § 222 (e), (f); part III, § 317 (f); part IV, § 421 (f).

(12) Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars.

Penalty.

(13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

Allowance to owner of property for service or instrumentality.

Publication required.

54 Stat. 912.

Commission may fix reasonable maximum allowance.

NOTE.—Comparable provisions, part II, § 225; part III, part IV, § 415.

(14) The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this part.

Enumeration of powers not exclusive.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE LONG ISLAND RAIL ROAD COMPANY,

Petitioner,

77-4118

v.

THE UNITED STATES OF AMERICA and THE
INTERSTATE COMMERCE COMMISSION,

Respondents,

S & K FARMS, INC. and FREIGHT USERS ASSOCIATION
OF LONG ISLAND, INC.,

AFFIDAVIT
OF SERVICE
BY MAIL

Intervening Petitioners,

SOUTHERN PACIFIC TRANSPORTATION COMPANY, THE
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, and UNION PACIFIC
RAILROAD COMPANY,

Intervening Respondents.

STATE OF NEW YORK)

COUNTY OF SUFFOLK)

ss.:

ROSEANN WEST, being duly sworn, deposes and says that
she is not a party to this action, is over 18 years of age and
resides at Soundview Drive, Lloyd Neck, NY 11743.

On the 19th day of August, 1977, deponent served the
within

Motion to Late File

Affirmation

Brief of Intervening Petitioners (2 copies)

upon the following by depositing true copies of same enclosed

in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

George M. Onken, Esq.
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Attorneys for Intervening Respondents.

Sworn to before me this
19th day of August, 1977.

George Carl Pezold

Roseann West

Roseann West
GEORGE CARL PEZOLD
NOTARY PUBLIC, State of New York
No. 52-8350450
Qualified in Suffolk County
Term Expires March 30, 1978

